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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

STEPPING STONES ASSOCIATES,

Petitioner,

– against –

THE CITY OF WHITE PLAINS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals of New York ignored *McDonald v. Miller*, 414 U.S. 1158 and other precedents of this Court by upholding the validity of an ordinance that was unreasonable and unconstitutional in that it denied the Petitioner's rights to equal protection of the laws in that the Petitioner was not treated as others similarly situated and there was no rational basis for the discrimination.

2. Whether the Court of Appeals of New York ignored *Seattle Trust Co. v. Roberge*, 278 U.S. 116, and *Nectow v. Cambridge*, 277 U.S. 183, and other precedents of this Court by upholding the validity of an ordinance that was unreasonable and unconstitutional in that it denied Petitioner's rights to due process in that the ordinance had no reasonable relationship to a governmental purpose.

THE PARTIES

The parties before this Court are those set forth in the caption.

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IN THE

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OCTOBER TERM, 1984

STEPPING STONES ASSOCIATES,

Petitioner,

— against —

THE CITY OF WHITE PLAINS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Stepping Stones Associates, respectfully prays that a writ of certiorari issue to review the order and opinion of the New York State Court of Appeals entered in this proceeding on December 13, 1984.

OPINIONS BELOW

The opinion of the New York State Court of Appeals is annexed hereto as Appendix A. The Supreme Court Appellate Division's opinion is annexed hereto as Appendix B. The New York Supreme Court decision and judgment are annexed hereto as Appendix C. The Constitutional questions were raised in the initial complaint annexed hereto as Appendix D.

JURISDICTION

The opinion and order of the Court of Appeals was entered on December 13, 1984 and this petition for certiorari was filed within ninety (90) days of that date.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the United States Constitution provides that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and, foreign States, Citizens or Subjects.

Article XIV, Section 1, of the Constitution of the United States provides:

> Citizenship-Due Process of Law-Equal Protection. — All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

The within matter arises out of a Declaratory Judgment action brought by Petitioner challenging the legality and constitutionality of the White Plains water rate statute. The Complaint was served together with a Motion for Summary Judgment upon the City of White Plains (herein referred to as "City" or "Respondent"). The parties agreed that Summary Judgment was appropriate for determination of the within matter as there were no facts in dispute. The Court found in favor of the Petitioner and the Judgment was entered on January 19, 1983. The City thereupon appealed and the Appellate Division reversed by a decision dated March 26, 1984. The Court of Appeals of New York affirmed December 13, 1984.

The facts of this matter were not in dispute. The City of White Plains by action of the City Council establishes water rates. From 1958 to 1981 the Council set the rate at a flat rate for the first 1200 cubic feet (cf) or less and a reduced rate for every 100 cf thereafter. This was based on the undisputed fact that there is an economy of scale in the supplying of water with the cost of production decreasing with the incremental increase in the supply of water to a particular customer. In April, 1981 the Council changed the rate structure to provide for an increasingly graduated water rate and a billing procedure requiring billing by a new definition of "account" which was based upon ownership.

Petitioner, a White Plains apartment house owner, brought this action based on the fact that the rate structure as applied to an apartment house dwelling resulted in inequitable and illegally discriminatory billing. Petitioner contended that the aggregation of the water usage for 248 residential units before the application of the graduated rate results in a compounding of the water rate charge so that it bears no relationship to the amount used by each residence. Petitioner's tenants are not charged directly or indirectly for water. Thus, such a rate structure does not lead to conservation (the stated end of the graduated rate) by apartment dwellers and the billing procedure

which is responsible for the aggregation has no legitimate end. In other words, Petitioner pays a water charge based on the total cumulative water usage for 248 apartments resulting in an increased charge of $1.40 per 100 cf for a substantial portion, about half, of the water it uses simply because the ordinance requires a single account for billing purposes. The basic rate is $ .40 per cf. The City's method costs the Petitioner approximately $26,000.00 per year more than it would have had to pay had the charge been computed fairly on a per residence basis as other residences in the City are charged, and in a manner which does not discriminate illegally against Petitioner nor cause Petitioner to subsidize others. For these reasons Petitioner maintains the rate structure is violative of its right to equal protection of the law. Moreover, the City, in promulgating this rate structure violated due process of law in not setting a rate structure rationally related to the stated goals.

The Water Ordinance provides for a definition of account that requires that where there are two (2) or more buildings or structures and one or more connections, and the service lines and/or systems are interconnected, as with Petitioner's buildings, the City will "combine meter readings" to arrive at a gross water usage for billing purposes. The billing is based on ownership and thus the usage for all of the units was aggregated prior to the application of the rate and the total was billed as a single account.

The factual underpinning of the decision of the Trial Court included substantial data relative to the classification of the Petitioner as "commercial" which classification Petitioner had contended was inappropriate. Petitioner agreed that it was being considered commercial but claimed this was illegal. Reference was made, by Petitioner, to the White Plains zoning code which also separated commercial from residential, and which Petitioner pointed out, included apartment houses in the residential category. The City, although asserting that condominiums were also commercial, allowed some condominiums and other multi-family units, among them "White Plains Commons" to be separately charged for water usage on a per residential unit basis, the same relief requested by the Petitioner. The water usage in these condominiums was not aggregated.

Petitioner submitted substantial literature indicating the numerous studies on the economics of the demand for and supply of water. In the main, although there are many ways to charge for water, the graduated method used by Respondent herein is not widely accepted, was recognized by one expert as "discriminatory," and actually subsidizes smaller users. The City itself recognized that this water pricing structure was unique in Westchester although one of the stated goals was to remain consistent with other communities in the area.

Petitioner submitted proof below that demand for residential water was generally unresponsive to price increases. A National Water Commission study even indicated that water usage in apartments was already lower than in detached homes and water price increases have less of an impact on use in apartments.

Petitioner calculated, in numerical terms, the per capita water charges based on Respondents' projections and computations. The per capita charge in White Plains was $59.00 per year. The per capita charge for a resident of Petitioner's building, however, was approximately 50% greater, or $86.00 per year, all of which was paid for by Petitioner, not by the resident. This figure did not indicate the true disparity since the per capita charge for White Plains also included major industrial users. If there were a comparison for single family dwellings as against apartment house residents, the disparity would be even greater.

The effect of the utilization of the incrementally increasing rate structure applied to the aggregated usage as required by the billing procedure was that Petitioner did not pay 248 times one user, but paid almost 750 times one user, or triple what it should have been paid had the usage been divided among the 248 units of Petitioner's building first, with the rate charge then applied. Petitioner should have been paying $7,815.00 semi-annually, but was, as a result of the increasing graduated aggregate structure, paying over $21,300.00 semi-annually.

Petitioner contended that the City Council did not consider the impact on the new water rate structure on apartment buildings (and the reports to the City Council concededly did not contain any scientific data), that there was no relationship

to a governmental purpose, that the rates charged to the Petitioner were not reasonable, and that the Petitioner was not treated as others similarly situated.

The Trial Court granted Petitioner's motion for summary judgment based on the record which demonstrated that the purpose of conservation was not met by the means of the new rate and that this Petitioner was being treated as a "commercial user" under the rate structure. The Trial Court found that treating the Petitioner as such was discriminatory and in violation of the equal protection guarantees of the Constitution. The New York Supreme Court Appellate Division reversed and was affirmed without decision by the New York State Court of Appeals.

REASONS FOR GRANTING THE WRIT

1. THE DECISION OF THE NEW YORK STATE COURT OF APPEALS CONFLICTS WITH *McDONALD V. MILLER*, 414 U.S. 1158 IN THAT THE STATUTE DEPRIVES THE PETITIONER OF EQUAL PROTECTION IN THAT PETITIONER IS NOT TREATED AS OTHERS SIMILARLY SITUATED AND THERE IS NO RATIONAL BASIS FOR THE DISCRIMINATION

The basis of Petitioner's claim is that it is being treated unequally, that the rate structure is factually and legally unsupported, and that Petitioner is therefore required to pay for water at rates that are discriminatory, inequitable and unreasonable. While the City may have the right to set rates, including graduated rates where appropriate, such rates must be reasonable and non-discriminatory, 63 N.Y. Jur. Rev., Waterwork's Section 116, p. 683.

Where the classification is "devoid of any rationality" there is a denial of equal protection of the laws. *State ex rel. Miller v. McDonald*, 200 Ind. 565, 297 N.E.2d 826, cert. denied, *McDonald v. Miller*, 414 U.S. 1158, 94 S. Ct. 917, 39 L. Ed.2d 111. In *McDonald v. Miller*, this Court let stand a state court decision that it was unconstitutional to treat apartment houses as commercial rather than residential for purposes of municipal garbage collection. This Court maintained the same position

in *Royal Amer. Corp. v. City of Euclid*, (No. 34018, August 2, 1975 cert. denied 425 U.S. 966, 96 S. Ct. 1751, 48 L.Ed.2d 210. The provision of services by a municipality, whether it be collection of garbage or water supply, must be made in a non-discriminatory fashion and apartment houses must be treated as other residential properties.

The New York Courts in *Town Board v. City of Poughkeepsie*, 22 A.D.2d 270, (2nd Dept. 1964) specifically restricted the ability to set water rates by stating:

> "this is *not* to say that the right to discriminate is *without* circumspection." *Id.* (emphasis added).

Town Board v. City of Poughkeepsie, supra, supports the position that the rates may vary according to usage only insofar as such variation is reasonably related to the stated end. In this case there is no purpose that justifies additional or aggregated charges for water usage by individual residencies in apartment houses billed as a single unit. In fact, the evidence supports a lower charge with increasing usage due to lower costs of supplying additional water. Increasing charges without showing that the service rendered is more costly has been held to be discriminatory in violation of the law. *Erickson v. Metropolitan Utilities District*, 107 N.W.2d 324, 331 (Nebraska). Any difference in treatment "is warranted only if the services are in fact different." *Village of Fox Point v. Public Service Commission*, 7 N.W.2d 571, 573. The result of the rate structure set by the City is an illegal discriminatory higher charge based on the graduated rate being applied to the aggregate usage of all the residences in the building.

The Respondent argued that rates charged to "customers" can be based on usage. This ignored the issue of who the customers are and whether they are being charged equally under the structure. The challenge herein is not simply to a graduated rate but to a graduated rate scale applied to an aggregation of the consumption by 248 users. Where there is no reasonable basis for an unequal assessment then the rate structure is unconstitutional. The stated purpose, conservation, can only be achieved if the

party charged for the water has control over the amount of usage. In this instance the apartment owner has absolutely no control over the amount of water used by any of the unit residences. The Respondent has never argued that conservation can be achieved without a direct pass-along and has thus conceded that the end will not be fostered by the single bill accounting system.

In addition, the authorities cited in Petitioner's original affidavit supported the fact that incremental increases in water charges do not result in a reduction of water usage in apartment houses. At the same time these studies show that generally apartment residents actually use less water per unit than single family residence users. The result is that the Petitioner is required to pay substantial additional charges for substantially less water per residence than either single family dwellings or multi-family units not billed as a single "account". This is a violation of the principle of equal protection of the law. *Juleah Co. Inc. v. Village of Roslyn*, 56 A.D.2d 483 (2nd Dept. 1977), and *Grove Gardens Housing Corp. v. Incorporated Vil. of Freeport*, Sup. Ct., Nassau County Index No. 6948-1966, aff'd 31 A.D.2d 599. In *Juleah* the garbage collection services had been provided to owners and occupants of all residential properties including apartment/multiple dwellings. Apartments were classified separately for purposes of the contract for pick-ups, and while one and two family homes were allotted three 30-gallon cans at the rear or four 30-gallon cans at curbside, per residential unit, apartments were only permitted one 30-gallon can at curbside per five apartments with additional charges applying to apartment houses with amounts over these.

The issue, in *Juleah*, was whether the village violated the equal protection clause of the Constitution of the United States where the Village set lower limits on the amount of garbage collected for apartment houses as distinguished from single family residences and charged only the apartment house owners additonal fees for garbage collection service. The Court in *Juleah* stated that the additional charges for apartment house owners were a denial of equal protection. *Juleah Co., supra*, at 929. Similarly, in the present matter the City's rate structure resulted in additional charges to the apartment house owner for provision of water. In this case the aggregation of all the units of

the building with an incrementally increasing rate results in an additional fee for what is in reality no additional usage. This is, of course, compared to 248 single family residences, not in an apartment house, whose use is billed per residence, not aggregated and to other multi-family units whose bills are also not aggregated. This assessment to Petitioner without a benefit and in this unequal manner is constitutionally inequitable and illegal.

In *Sperry Rand Corp. v. Town of North Hempstead*, 53 Misc.2d 970, 280 N.Y.S.2d 600, a similar issue arose also with respect to garbage collection and the Court held that the restriction of the benefit was "hardly equitable, and equality is the basic principle of taxation." *Sperry Rand Corp.* at 604.

In *Sperry*, unlike here, the Petitioner was clearly and admittedly an industrial plant. Nevertheless, the Court held that limiting the amount of refuse collectable to that allotted to residential property owners was without a rational basis and inequitable in that it was in effect a charge for a "non-existent" benefit. *Sperry, supra*, at 603-604. The practical effect of the City's action herein is just such a limitation. In the present situation the imposition of the graduated rate on the aggregated usage of 248 units results in charges for "non-existent" benefits and is also illegal. Certainly where the per residence or per capita usage is no more than in single family dwellings there can be no additional benefit upon which to base an increased cost per unit as the City has done herein.

The thrust of Petitioner's argument is that the City erred in not classifying the Petitioner as a residential consumer, the practical effect of that failure being that the Petitioner was concededly classified with commercial consumers, and by virtue of the application of the increasing charge to the aggregated usage pursuant to the billing procedure was penalized for housing the multiple consumers in its premises. The failure to classify and treat the Petitioner in the same manner as other residential units is constitutionally discriminatory and unreasonable.

In this case billing should be on a per residential (apartment) unit basis. The apartment houses must be considered as

residential and treated *de facto* the same way as single family dwellings regardless of the statutory classification, so that there is a direct relationship between each residential apartment dwelling unit and the rate charged. This is dictated where the total usage is probably less per unit and per capita in the multi-family dwelling yet the charges both per capita and per unit in an apartment house are greater, and thus, there is no rational basis for billing all of the units as a single account.

A review of cases throughout the nation indicates that the overwhelming consensus is that apartment houses must be treated as residential units and that a per unit method is the most appropriate since it is based on the "ultimate consumer theory," that is, a rational relationship. In *Knolts v. Nollen*, 218 N.W. 563 (Sup. Ct. Iowa, 1938) the Court approved of apartment units being classified as individual residences and being charged on a per unit basis and were not entitled to a sliding scale that benefitted hotels. In *Lewis v. Mayor and City Council of Cumberland*, 54 A.2d 319 (Court of Appeals of Maryland, 1947) the minimum charged per apartment also corresponded to the realities of usage and payment. *Land v. City of Grandville*, 141 N.W.2d 370 (Court of Appeals of Michigan, 1966) and *Oradell Village v. Township of Wayne*, 98 N.J. Super. 8, 235 A.2d 905, aff'd 244 A.2d 513, 251 A.2d 441 (Superior Court of N.J. Chancery Div., 1967) both approved a per unit residential classification, as did *Fort Collins Motor Homes, Inc. et al., v. The City of Fort Collins*, 490 P.2d 1074 (Colorado Court of Appeals, 1972) and *Oklahoma City Hotel and M.H.A. Inc. v. Oklahoma City*, 531 P.2d 316 (Supreme Court Oklahoma, 1974). These cases all support Petitioner's position that it should be treated as a residential not commercial user. Petitioner does not argue that it must under any system pay less than a commercial user: the caveat is that it be treated similarly with all other residential users and that the rate system be a rational one. Even in *Oklahoma City Hotel, supra*, where the residential classification resulted in a higher rate it was a higher rate per unit.

Petitioner's argument that it is entitled to a classification that is rationally based and which takes its unique character into

account is constitutionally sound and supported by the analysis in *Caldwell v. City of Abiline*, 260 S.W.2d 712, 714-715.

Specifically, as was stated by the Court in *Oradell Village v. Township of Wayne, supra*:

> "An apartment house is an aggregation of dwellings. The rate charged a family living in a multi-family dwelling should be essentially the same as that charged a family occupying a residence. It seems entirely reasonable to adopt a classification which takes account of the *ultimate consumer*, rather than a classification limited solely to a consideration of the utility's operating cost." (emphasis added).

As with the matter at bar, the Petitioner is the owner of an apartment house which is an aggregation of dwellings. The charge "should be essentially the same as that charged a family occupying a residence."

It is also noted that in *Oradell*, the Court stated that consumption is only one factor and that other factors such as the "cost of service, the purpose for which the service is received, the quantity of water consumed," and other factors were relevant and to be taken into account in establishing the rate.

In *Oklahoma City Hotel & Motor Hotel Association v. The Oklahoma City, supra*, the Supreme Court of Oklahoma reviewed the applicable cases. The Court discussed the underlying basis for the rate making and stated:

> "These cases are based on the theory that the ultimate use or ultimate consumer of the water is a reasonable basis for classification....The Courts generally stated that it would be unfair to single family dwellings if apartments, etc., were classified differently."
>
> * * *
>
> "By considering the ultimate consumer of the water or the service, we are forced to conclude that there are substantial differences between apartments and

> mobile home parks on the one hand and other volume commercial users on the other that will justify the rate classifications in the instant case. An apartment house is an aggregation of dwellings and it is not unreasonable to classify it with other dwellings rather than with hotels."

In *Lewis v. Mayor and City Council of Cumberland, supra*, the Court of Appeals of Maryland held that

> "Calling an apartment house a business does not alter the fact that it is an aggregation of dwellings. It is not unreasonable to classify it with other dwellings rather than with hotels."

The case at bar is the reverse of the cases previously brought in the other states, principally due to the fact that here the Respondent aggregated the rate to Petitioner's detriment and for the benefit of the single family residence. However, the reasoning of the various courts, in upholding the residential nature of an apartment house is no different than the reasoning which the trial court herein adopted. Even if Petitioner were to concede, which it does not, that there was only one classification the resultant constitutional discrimination would still be supported by the facts since "there may be no gain of one of a class at the expense of another of the same class," *Village of Fox Point v. Public Service Commission, et al.*, 7 N.W.2d 571, 574, and the Petitioner was clearly treated differently from others of the same class.

The New York State Court of Appeals upheld the statute herein without even considering the effect of the single account system or the "commercial classification" and relied only, as the Appellate Division had, on the City's right to establish a graduated rate. The decision below should be reviewed because it conflicts with the decisions of this Court and other State courts with regard to the standards set for examining equal protection claims, in this case the arbitrary and discriminatory effect of the single account billing.

2. THE DECISION OF THE NEW YORK STATE COURT OF APPEALS CONFLICTS WITH *SEATTLE TRUST CO. v. ROBERGE*, 278 U.S. 116 and *NECTOW v. CAMBRIDGE*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842 AND OTHER CASES IN THAT PETITIONER'S RIGHTS TO DUE PROCESS HAVE BEEN VIOLATED

The Petitioner's due process was violated in that the ordinance failed to bear a reasonable relationship to the stated ends. In the instant matter there was no such reasonable relationship between the stated end of conservation and the rate structure. Where no legitimate governmental purpose is served by an ordinance or if it is arbitrary in that there is no reasonable relationship between the end sought and the means used to achieve that end, then the ordinance is violative of due process. *Village of Belle Terre v. Borass*, 416 U.S. 1, 94 S. Ct. 1536, 39 L. Ed. 2d 797; *Euclid v. Amber Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303. *French Investing Co. v. City of New York*, 39 N.Y.2d 587, 385 N.Y.S.2d 5, 10.

In the instant matter the requirement that 248 units be aggregated for the purposes of billing prior to the application of a graduated rate for water usage had absolutely no relationship to any governmental purposes. Therefore, the statute was in violation of the due process clause of the Constitution and the application thereof as set forth in *Seattle Trust Co. v. Roberge*, 278 U.S. 116 and *Nectow v. Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842. Although the statutes in these cases refer to zoning ordinances the principles concerning the rational relationship of the enactment to the governmental objective remains applicable. The Petitioner has a right to water at a "reasonable" rate. *City of Mt. Vernon v. New York Interurban Water Co.*, 115 A.D. 658. An excessive rate as herein based on an artificial classification for billing purposes without any rational basis is a denial of due process.

The Petititoner's additional due process argument is that the City failed in its obligation to consider the appropriate factors in setting the rate structure for water charges. This included, *inter alia*, the failure to examine whether the graduated rate applied to the cumulated usage in an apartment house under

the single account billing and would encourage conservation or be consistent with other communities in the area, which were the stated purposes of the change. It was incumbent upon the City when making such a substantial change in the rate structure to consider not only the potential for increasing conservation but the actual impact on the various types of users. It should have considered cost, the service furnished, the nature and use made of the premises to which the water is supplied, the purpose for which the service or product is received, or the line of business carried on therein, or other matters affecting the usage. 94 CJS, Sec. 297, pages 201-202. These factors are cited by the Court in *Caldwell v. City of Abiline, supra,* at 714.

The ruling below should be reviewed in light of its conflict with the traditional standard for evaluating due process claims particularly the failure to examine the relationship between the single account bill and any governmental goals.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the New York State Court of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX A

DECISION COURT OF APPEALS
DATED DECEMBER 13, 1984

STATE OF NEW YORK: COURT OF APPEALS

----------x

STEPPING STONES ASSOCIATES, 2 No. 624

Appellant,

—against—

THE CITY OF WHITE PLAINS,

Respondent.

----------x

Order affirmed, with costs, for reasons stated in the memorandum at the Appellate Division (100 AD2d 619).

Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer, Simons and Kaye concur.

APPENDIX B

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department held in Kings County on March 26, 1984.

HON. LAWRENCE J. BRACKEN, JUSTICE PRESIDING
HON. JAMES F. NIEHOFF,
HON. ISAAC RUBIN,
HON. SEYMOUR BOYERS.

STEPPING STONES ASSOCIATES,

Respondent,

v

ORDER ON APPEAL FROM JUDGMENT

THE CITY OF WHITE PLAINS,

Appellant.

In the above entitled cause, a declaratory judgment action, the above named The City of White Plains, defendant, having appealed to this Court from a judgment of the Supreme Court, Westchester County, entered January 11, 1983, which granted plaintiff's motion for summary judgment to the extent it declared that the classification of plaintiff under defendant's water rate system is discriminatory and illegal and directed that the defendant refund a portion of the money paid by plaintiff for its water bill; and the said appeal having been argued by Charles A. Bradley, Esq., of counsel for the appellant and argued by Dorothy M. Finger, Esq., of counsel for the respondent, due deliberation having been had thereon; and upon this court's opinion and decision slip heretofore filed and made a part hereof, it is

ORDERED that the judgment appealed from is hereby unanimously reversed, on the law, with costs, summary judgment is granted to defendant (CPLR 3212, subd (b)) and it is declared that the water rate regulations of the defendant are legal and not discriminatory insofar as they apply to plaintiff.

ENTER

IRVING N. SELKIN

Clerk of the Appellate Division.

APPELLATE DIVISION – SUPREME COURT
SECOND DEPARTMENT
STATE OF NEW YORK

IRVING N. SELKIN, Clerk of the Appellate Division of the Supreme Court Second Judicial Department, do hereby certify that I have compared this with the original filed in my office on March 26, 1984 and this copy is a correct transcription of said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of this Court on March 26, 1984.

IRVING N. SELKIN

1841S
Z/mc

LAWRENCE J. BRACKEN, J.P.
JAMES F. NIEHOFF
ISAAC RUBIN
SEYMOUR BOYERS, JJ.

_____AD2d_____ A - March 1, 1984

Stepping Stones Associates, respondent, v.
The City of White Plains, appellant.

Charles A. Bradley, Corporation Counsel, White Plains, N.Y.
(Joseph Henneberry of counsel), for appellant.

Finger and Finger, White Plains, N.Y.
(Dorothy M. Finger of counsel), for respondent.

In a declaratory judgment action, defendant appeals from a judgment of the Supreme Court, Westchester County (DICKINSON, J.), entered January 11, 1983, which granted plaintiff's motion for summary judgment to the extent it declared that the classification of plaintiff under defendant's water rate system is discriminatory and illegal and directed that defendant refund a portion of the money paid by plaintiff for its water bill.

Judgment reversed, on the law, with costs, summary judgment is granted to defendant (CPLR 3212, subd (b)) and it is declared that the water rate regulations of the defendant are legal and not discriminatory insofar as they apply to plaintiff.

A municipal ordinance carries an exceedingly strong presumption of consitutionality (*Marcus Assoc. v. Town of Huntington*, 45 N.Y.2d 501). While the presumption is rebuttable, unconstitutionality must be demonstrated beyond a reasonable doubt (*Kurzius, Inc. v. Incorporated Vil. of Upper Brookville*, 51 N.Y.2d 338). Plaintiff did not meet its burden of proof in the instant case.

A municipality that operates its own water supply system may establish its own rates (Municipal Home Rule Law, Sec. 10, subd 1, pars (i), (ii), cl a, subcl (9-a)) and rates may be established which will vary according to usage (Public Service Law, Section 89-c, subd 12; see *Town Bd. of Town of Poughkeepsie v. City of Poughkeepsie*, 22 AD2d 270). In 1981, in order to make its water system self sustaining and to encourage conservation, defendant adopted a graduated fee scale whereby the charge for each unit consumed increased with consumption. Since this fee system is rationally related to the city's legitimate goals of establishing a self-supporting water fund and water conservation, the rate structure is not unconstitutional. As there are no issues of fact to be decided, summary judgment is granted to defendant pursuant to CPLR 3212 (subd (b)).

BRACKEN, J.P., NEIHOFF, RUBIN and BOYERS, JJ., concur.

March 26, 1984

STEPPING STONES ASSOC. v
THE CITY OF WHITE PLAINS

477 E

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ENTERED JANUARY 19, 1983

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STEPPING STONES ASSOCIATES,

Plaintiff,

—against—

JUDGMENT
Index #5775/82

THE CITY OF WHITE PLAINS,

Defendant.

The Plaintiff, Stepping Stones Associates, having duly commenced an action against the Defendant, The City of White Plains, for a Declaratory Judgment to declare Paragraphs (f), (h), (i) & (o) of Article 7, Appendix A of the Water Rules and Regulations of the City of White Plains, approved April 27, 1981 and effective May 1st, 1981 null, void, and of no legal effect insofar as said water Rules and Regulations apply to the Plaintiff and a Summons and Verified Complaint, duly verified March 2, 1982 having been served on the Defendant on or about March 2, 1982, and the Defendant having served a Verified Answer on the Plaintiff on or about July 30th, 1982, and the Plaintiff having moved by Notice of Motion issued March 2, 1982, returnable after several adjournments on August 17, 1982, for Summary Judgment on behalf of the Plaintiff as to the issues set forth in the action for a Declaratory Judgment and for Summary Judgment declaring: (1) the Water Rate schedule null, void and of no legal effect and (2) for a Judgment directing a refund to the Plaintiff of $13,775.00, and the Affirmation of

Kenneth J. Finger duly affirmed to March 2, 1982 and a Reply Affidavit of John DeRosa, Jr., duly sworn to August 12th, 1982 and the Affidavit of Patti McCormack Smith, duly sworn to August 16, 1982, all having been submitted in support of the said motion, and the Defendant, by Affirmation of Joseph W. Henneberry, Esq., duly affirmed July 30, 1982 having been submitted in opposition to the Plaintiff's motion for Summary Judgment; and the Plaintiff having submitted a Memorandum of Law in support of the motion and the Defendant having submitted a Memorandum of Law dated July 30th, 1982 in opposition to the motion and

The above motion having regularly come on to be heard before the Hon. Fred A. Dickinson, without a jury, at a Special Term, Part I of the Supreme Court of the State of New York, County of Westchester, on the 17th day of August, 1982, and the issues in the above-entitled proceeding having duly come on to be heard, and the proofs of both parties having been adduced and their respective counsel having been heard, and after due deliberation having been held thereon, and a Decision of this Court having been made therein and filed on the 9th day of November, 1982 in favor of the Plaintiff and against the Defendant, and directing Judgment as hereinafter provided, it is

ORDERED, ADJUDGED AND DECREED that the classification of the Plaintiff as a commercial user under the White Plains Water Rate system incorporated in Article 7, Appendix A, Paragraphs (f), (h), (i) & (o) of the Water Rules and Regulations of the City of White Plains as amended effective May 1, 1981 is discriminatory and illegal and it is further

ORDERED, ADJUDGED AND DECREED that Article 7, Appendix A, paragraphs (f), (h), (i) & (o) of the Water Rules and Regulations of the City of White Plains, as amended effective May 1, 1981 insofar as it applies to Plaintiff, is unconstitutional, illegal and void; and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff is entitled to a refund from the City of White Plains and

Defendant is directed to refund to Plaintiff the sum of $13,487.98 for the water bill paid for the period from April 24, 1981 to November 13th, 1981 and billed as of December 1, 1981 and paid on December 31, 1981 together with interest from December 31, 1981 at the legal rate; and it is further

ORDERED, ADJUDGED AND DECREED that the water rate charge applicable to Plaintiff, as an apartment house owner, is to be computed by taking the Plaintiff's total water usage, and dividing that water usage by the number of apartments in Plaintiff's premises and then computing a per apartment charge using the Water Rate Rules and Regulations of the City of White Plains, Article 7, Appendix A, paragraphs (f), (h), and (i) thereof, as amended effective May 1, 1981. After computation of the water charge per one apartment, the total water charge to Plaintiff is arrived at by multiplying the water charge for one apartment by the number of apartments in the premises; and it is further

ORDERED, ADJUDGED AND DECREED that the Plaintiff is entitled to a refund from the City of White Plains and the Defendant is directed to refund to the Plaintiff the difference between any water charge paid to the City of White Plains by the Plaintiff pursuant to the Article 7, Appendix A, paragraphs (f), (h), (i) and (o) of the Water Rate Rules and Regulations of the City of White Plains as amended effective May 1, 1981 and the water rate charge recomputed pursuant to the Judgment herein, plus interest at the legal rate from the date of the payment.

ENTER

January 11, 1983
Carmel, N.Y.

s/ Fred A. Dickinson
J.S.C.

HON. FRED A DICKINSON,
JUSTICE

ANDREW J. SPANO

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

ENTERED JANUARY 19, 1983

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STEPPING STONES ASSOCIATES,

Plaintiff,

— against —

THE CITY OF WHITE PLAINS,

Defendant.

DECISION
Index No. 5775/82
Mot. Cal: 8-17-82
#16

DICKINSON, J.

This is a declaratory judgment action to challenge the Defendant's enforcement of a revised schedule of water rates and the collection of charges attendant thereto as it concerns this Plaintiff.

Plaintiff now moves for summary judgment.

Plaintiff is the owner of certain property located at 125 Lake Street, White Plains, New York. Said property is a residential apartment house consisting of approximately 248 rental apartments.

Water rates in the City of White Plains are fixed pursuant to Section 197 of the City Charter by the Commissioner of Public Works with the approval of the Common Council. That a municipality has the power to set such a rate is not questioned (Municipal Home Rule Law, Section 10, subd. 1 (ii) a (9-a)).

An ordinance proposing new water rates, which rates would escalate with higher consumption, was presented by the

Commissioner of Public Works to the Common Council on April 6, 1981. These rates were submitted as part of the City's fiscal year 81-82 budget. Subsequent to public hearings, the graduated water rate was adopted on April 27, 1981.

According to the Defendants, the purpose of the water rate was to establish a self-sustaining water fund and to promote water conservation.

Plaintiff claims that the rates as applied to it are arbitrary, capricious and without a rational relationship as well as a violation of its rights to due process and equal protection. The reason for this is that the Plaintiff was classified as a commercial user which means that it is charged for the total amount of water used by the building. Plaintiff claims that this is discriminatory because the Plaintiff's bill is not based on the incremental usage of the individual apartment users but is an aggregate of all 248 users. Therefore, under the graduated water rate system, there would be a much higher usage which means a much higher per gallon charge for the Plaintiff. Being charged as just one individual user, the Plaintiff is paying a higher per gallon rate than a smaller individual user such as an individual home owner.

The principal objection to this rate as raised by the Plaintiff is not so much the rate itself but the classification of the Plaintiff as commercial rather than a residential user. Plaintiff claims it is discriminated because, being an apartment house, it consists of 248 residences, not one commercial use, and therefore, the total usage should be divided by the 248 individual apartment users.

It is the position of the Defendants, that a graduated water rate system which was adopted accomplishes their legislative goals. In so adopting this procedure, the Common Council chose to distinguish in the rate on the basis of water used as opposed to the user. Therefore, the larger commercial user would bear a heavier burden than the residential consumer who obviously would use less water on an individual basis.

The question raised by this action is not the fairness of the system *per se*, but rather its fairness insofar as classifying Plaintiff

as a commercial user, i.e., charging plaintiff for the total amount of water consumed as one user, rather than spreading it out among 248 individual users.

It is well established that any water rate prescribed must be reasonable under the circumstances (*Town Board of the Town of Poughkeepsie v. City of Poughkeepsie*, 22 A.D.2d 270; *Silkman v. Board of Water Commissioners*, 152 N.Y. 327 at 332).

Defendant relies a great deal on the *Town of Poughkeepsie* case, *supra*, in support of its position that a municipality has the right to set different rates for different users. In that case, the City of Poughkeepsie sold water to the Town of Poughkeepsie by rates set by the City. Different rates were established for different consumers. However, even under the rate used in that case (Law of 1896, Chapter 425, amended by Law of 1910, chapter 632, Section 119 (2)) it was clearly determined that the different rates which were based on consumption were to be determined by individual metering, a situation which does not exist in our case. It was also in that case that the Court ruled that there was a reasonable basis for the City to charge higher rates for water sold to the Town than for the water sold to the residents of the City. But there was a reasonable relationship there because there was an added cost of transporting water out to the town.

An examination of the water rate system as it applies to this Plaintiff shows that there is no rational basis for treating the Plaintiff as a lump sum consumer which therefore must pay the higher rates. An examination of the basis for the water rate system in White Plains bears this out. For one thing, the purpose of conservation is not met because as it is pointed out by the Plaintiff and not really questioned by the Defendant, there is no impetus to conserve water if the individuals using it, in this case, the individual apartment users, are not the ones paying for it. It is the Plaintiff itself who is paying and yet it cannot pass these rates on to the apartment users (Emergency Tenant Protection Act of 1974). In line with that, this also shows the impracticality of Defendant's suggestion that Plaintiff install individual water meters. Defendant itself stated that the

Plaintiff could, at best, use the meters for estimates, but the cost of higher water rates could still not be passed on to those individuals who were found to be heavy users.

Finally, the Court cannot accept Defendant's unsupported argument that Plaintiff should not be treated differently than other commercial users, such as hospitals. It is a matter of common sense that the needs and use of water by a hospital is considerably different than that of the residents of an apartment house.

Summary Judgment for Plaintiff is granted to the extent that the classification of Plaintiff as a commercial user under the White Plains water rate system is discriminatory and illegal and Plaintiff is entitled to a refund of overpayments made under that classification.

Settle Judgment.

s/Fred A. Dickinson
J.S.C.

Dated: Carmel, New York
November 1, 1982

ENTERED
NOVEMBER 9, 1982

APPENDIX D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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STEPPING STONES ASSOCIATES,

Plaintiff,

— against —

THE CITY OF WHITE PLAINS,

Defendant.

VERIFIED COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiff, by FINGER AND FINGER, A PROFESSIONAL CORPORATION, its attorneys, respectfully alleges:

FIRST: At all times hereinafter mentioned, the Plaintiff, STEPPING STONES ASSOCIATES, (herein referred to as "Stepping Stones") was and still is a partnership duly organized and existing under and by virtue of the Laws of the State of New York.

SECOND: At all times hereinafter mentioned, the defendant, CITY OF WHITE PLAINS, (herein referred to as "White Plains") was and still is a municipal corporation duly organized and chartered under the laws of the State of New York.

THIRD: The Plaintiff herein seeks a Declaratory Judgment declaring that the Water Usage Chart of White Plains as applied to plaintiff be declared null and void and be revoked and rescinded.

FOURTH: At all times herein mentioned, the defendant and its agents, were and still are subject to the Constitution of the United States, the Constitution of the State of New York, the statutes, ordinances, codes, rules and regulations of the State of New York.

FIFTH: The plaintiff at all times herein mentioned, was the landlord of certain properties in the City of White Plains, County of Westchester, known as Stepping Stones and located at 125 Lake Street.

SIXTH: Defendant by an enactment of the City Council revised the rate schedule for fees for water usage.

SEVENTH: The revised water schedule (Exhibit A) requires an increase in the charge per 100 cubic feet of water consumed as consumption increases.

EIGHTH: Plaintiff received a bill of $21,303.70 representing charges for the use of 18,748 hundred cubic feet of water (Exhibit B).

NINTH: Plaintiff paid the bill under protest and the defendant agreed that a decision regarding the legality of the rate structure as it applies to plaintiff be left to the Court in a declaratory judgment action.

TENTH: Plaintiff's building, Stepping Stones, has 248 apartments and users with many more individuals living in the building.

ELEVENTH: The plaintiff's rate should be based on an aggregate of 248 individual rates rather than the cumulative use of the 248 at the increasingly higher per gallon rate.

TWELFTH: The number of gallons used, per apartment and user, is 75.59 hundred gallons per user.

THIRTEENTH: By requiring the Plaintiff to pay a usage fee based on 18,748 hundred cubic gallons using the sliding scale, the defendant overcharged the plaintiff approximately $13,487.86.

a) If defendant charged the plaintiff based on an average per user/apartment rate, the charge would be as follows:

50 hundred cubic feet at $.40 per cubic foot =	$200.00
25.59 hundred cubic feet at $.45 per cubic foot =	$115.15
Total usage per apartment =	$315.15
248 apartments X $315.15 per apartment =	$7815.72
(b) The total charged plaintiff was	$21,303.70
The correct total to be charged plaintiff should have been	$7,815.72
The overcharge to Plaintiff was	$13,487.98

FOURTEENTH: Plaintiff should only have to pay at the rate of $.40 to $.45 per gallon or a total of $7815.72.

FIFTEENTH: The plaintiff contends that the actions of the defendants are in violation of the plaintiff's rights and the law, in that the plaintiff has been denied due process of law and equal protection; the defendants are arbitrary, capricious and unreasonable and have violated the law and committed abuse of discretion by collecting charges in violation of the plaintiff's rights.

SIXTEENTH: By reason of the foregoing a serious controversy exists between the parties herein. Unless said controversy is expeditiously and definitively determined the controversy will in the immediate future lead to a multiplicity of lawsuits over additional and future water use charges and will adversely affect the community.

SEVENTEENTH: The plaintiff has been denied rights under the Constitution without any reasonable necessity for the accomplishment of any lawful purpose.

EIGHTEENTH: The Plaintiff will continue to be denied rights as each bill is rendered according to the revised statute.

NINETEENTH: That by reason of the foregoing, and the serious dispute that exists between the parties, the plaintiff claims serious and irreparable injury and harm.

TWENTIETH: Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff demands judgment against the defendant:

a) Declaring that insofar as Plaintiff is concerned the revised rates for water usage are null, void, and of no legal effect whatever;

b) Directing that defendant repay the sum of $13,775.00 to the plaintiff;

c) For such other and further relief as to this Court seems just and proper in the premises, together with the costs and disbursements of this motion.

FINGER AND FINGER
A PROFESSIONAL CORPORATION
Attorneys for Plaintiff
14 Mamaroneck Avenue
White Plains, New York

Dated: White Plains, N.Y.
March 2nd, 1982

State of New York
County of Westchester SS.:

John DeRosa, being duly sworn, deposes and says: deponent is the Partner of Stepping Stones Associates a domestic corporation, plaintiff in the within action; deponent has read the foregoing Verified Complaint and knows the contents thereof; and the same is true to deponent's own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters deponent believes it to be true. This verification is made by deponent because Stepping Stones Associates is a corporation and deponent is an officer thereof. The grounds of deponent's belief as to all matters not stated upon deponent's knowledge are as follows: all records, files and information are in his possession.

Sworn to before me on February 25, 1982

/s/ John DeRosa
JOHN DEROSA

/s/Notary Public
NOTARY PUBLIC

APPENDIX E

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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STEPPING STONES ASSOCIATES,

Plaintiff,

—against—

VERIFIED ANSWER
Index No. 5775/82

THE CITY OF WHITE PLAINS,

Defendant.

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DEFENDANT, by its attorney, Charles A. Bradley, Corporation Counsel of the City of White Plains, for its answer alleges:

FIRST: Denies knowledge or information sufficient to form a belief as to the allegations contained in paragraphs numbered "TENTH" and "TWELFTH" of the complaint.

SECOND: Denies each and every allegation contained in the complaint at paragraphs numbered "ELEVENTH," "THIRTEENTH," "FOURTEENTH," "FIFTEENTH," "SIXTEENTH," "SEVENTEENTH," "EIGHTEENTH" and "NINETEENTH,"

AS AND FOR A FIRST SEPARATE AND COMPLETE DEFENSE

THIRD: Defendant's graduated water rates were established according to law and were not arbitrary, capricious nor discriminatory.

FOURTH: Defendant's purposes in establishing such rates were to create a self-sustaining water fund and to encourage water conservation.

FIFTH: Distinctions within the graduated water rates are solely based on the amount of water consumed.

SIXTH: Defendant has a right under the New York State Constitution not only to have a self-sustaining water fund, but even to have a "fair return" over and above costs of operation and maintenance. *N.Y.S. Constitution, Article 9, Section 1 (f).* Defendant chose only to have a "break-even" fund.

WHEREFORE, Defendant respectfully requests that this Court dismiss the complaint in all respects.

Dated: White Plains, New York
July 30, 1982

CHARLES A. BRADLEY, ESQ.
Corporation Counsel
Attorney for Defendant
The City of White Plains
Municipal Building
255 Main Street
White Plains, N.Y. 10601

TO: FINGER AND FINGER, ESQS.
Attorneys for the Plaintiff
158 Grand Street
White Plains, New York 10601

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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STEPPING STONES ASSOCIATES,

Plaintiff, VERIFICATION
Index No. 5775/82

—against—

THE CITY OF WHITE PLAINS,

Respondent.

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STATE OF NEW YORK
COUNTY OF WESTCHESTER SS.:

JOSEPH W. HENNEBERRY, being duly sworn, deposes and says:

That he is a Senior Assistant Corporation Counsel of The City of White Plains, has read the foregoing answer and knows the contents thereof, the same is true as to deponent's own knowledge and is based on a review of defendant's minutes and records.

Sworn to before me this
30th day of July, 1982.

/s/ Notary Public
NOTARY PUBLIC

/s/ Joseph W. Henneberry
JOSEPH W. HENNEBERRY

Rose R. Mancioumi
Notary Public State of New York
No. 4800461
Qualified in Westchester County
Commission Expires March 30, 1983

APPENDIX F

THE CITY OF WHITE PLAINS

OFFICIAL PROCEEDINGS
of the Common Council

Vol. 66 City of White Plains, N.Y., Apr. 6, 1981 No. 8

To the Honorable Common Council of The City of White Plains

Dear Council Members:

Having reviewed with the Commissioner of Finance the current and projected operating expenses of the City's Water Fund, and in support of Regional water conservation goals, I am herewith submitting for your consideration an ordinance approving revised water rates and fees pursuant to Section 197 of the City Charter.

It is recommended that paragraphs f, h and i of Article 7, Appendix A, of the Water Rules and Regulations prescribed by the Commissioner of Public Works and approved March 5, 1979 be amended to read as follows:

APPENDIX A

CHARGES, FEES AND DEPOSITS

f. WATER RATES

Consumption (semi-annual)	Charge (semi-annual)
0- 5,000cf	$0.40/100cf
5,001- 15,000cf	$0.45/100cf
15,001- 35,000cf	$0.50/100cf
35,001- 65,000cf	$0.60/100cf
65,001- 120,000cf	$0.80/100cf
120,001- 500,000cf	$1.00/100cf
120,000-1,000,000cf	$1.20/100cf
1,000,001- and over	$1.40/100cf

h. WATER AVAILABILITY / DEMAND CHARGE

These charges are applicable from the date the tap or connection, made to the municipal water system, is placed in service until such time as same tap or connection is permanently discontinued in accordance with Section 2.04(c) of these Rules and Regulations.

Within City Limits

Size of Connection	Charge (semi-annual)
1" & less	$ 8.00
1 1/2"	18.00
2"	32.00
3"	72.00
4"	128.00
6"	288.00
8" & over	512.00

Outside City Limits: Double the "Within City Limits" charges

i. FIRE MAIN AND FIRE SERVICE LINE STAND-BY CHARGE

Pipe Size	Charge (semi-annual)
Up to 6"	$ 60.00
8" and over	100.00

The revised water rates and fees will be implemented as follows:

	All Regular Billings Rendered
*Water Availability / Demand Charge On or after	July 1, 1981
*Fire Main & Fire Service Line Stand-By Charge	June 1, 1981
*Water Rates:	May 1, 1981

All consumption prior to May 1, 1981 will be billed at the current rates, and all consumption on or after May 1, 1981 will

be billed at the new rate. All water billings related to consumption which overlaps the May 1 date will be pro-rated and based on the number of days before and after the May 1 date.

(o) ACCOUNT – definition

Under our present level rate structure and billing procedures, each official water meter is considered and established as a separate account. Large buildings often have multiple connections and/or meters. Under the proposed escalating rate structure, the quantity of water consumed and recorded on multiple meters within individual buildings will have a direct bearing on the amount charged.

Therefore, for the purpose of determining the quantity of water consumed in any building or group of buildings necessary to calculate the appropriate individual charge (an account), the following parameters shall be used to define an "Account" and that Article 1, General Conditions – Section 1.01 Definitions be amended to include the following:

"Account" – Domestic Service

		Billing as:
Case 1	a Building or Structure 1 Connection to municipal system –Combine meter readings–	1 account
Case 2	1 Building or Structure 2 or more connections 2 or more official water meters Service lines/systems *interconnected* –Combine meter readings–	1 account
		Billing as:
Case 3	1 Building or Structure 2 or more connections Service lines/systems not *interconnected* Individual official water meter for *each non-interconnected service line*	1 account for each system

Case 4	2 or more buildings or structures 1 or more connections Service lines/systems *interconnected* 1 or more official water meters —Combine meter readings—	1 account

A report entitled *CITY OF WHITE PLAINS WATER FUND – PROPOSAL TO INCREASE RATES AND FEES* is attached to provide the Common Council with supporting data for this proposed rate increase.

Samuel J. Bartholomew
Commissioner of Public Works

Dated: April 6, 1981